STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 242720 Ingham Circuit Court
ANTONIO HECTOR AGUIRRE, Defendant-Appellant.	LC No. 01-077575-FC

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349, and third-degree fleeing and eluding, MCL 257.602a(3). Defendant was sentenced to concurrent sentences of 120 to 180 months' imprisonment for his kidnapping conviction, and 60 to 120 months' imprisonment for his fleeing and eluding conviction. He appeals as of right. We affirm.

I. Evidentiary Error

A. Standard of Review

Defendant first argues that the trial court erred by denying admission into evidence of a baseball bat allegedly taken by defendant from the crime scene. A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), citing *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). An abuse of discretion exists where "an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the courts ruling." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 256 (2002), citing *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000).

B. Analysis

On the third day of trial, defendant moved to admit a baseball bat into evidence. The trial court did not admit the bat because defendant failed to disclose the bat in compliance with the prosecutor's pretrial request. MCL 767.94a provides in part:

> (1) A defendant or his or her attorney shall disclose to the prosecuting attorney upon request the following material or information within the possession or control of the defendant or his or her attorney:
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> * * *
>
> (d) Any book, paper, document, photograph, or tangible object that the defendant intends to offer in evidence or that relates to the testimony of a witness, other than defendant, whom the defendant intends to call.
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> * * *
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> (3) A defendant shall not offer at trial any evidence required to be disclosed pursuant to subsection (1) that was not disclosed unless permitted by the court upon motion for good cause shown. A motion under this subsection may be made before or during trial. [MCL 767.94a.]

Also, MCR 6.201(A)(6) requires that, when requested, a party must provide "a description of and an opportunity to inspect any tangible physical evidence that the party intends to introduce at trial." Subsection (J) of the court rule states that if the party does not comply with the rule, "the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy."

Here, pursuant to MCL 767.94a and MCR 6.201(A)(6), the prosecution filed a document entitled "disclosure demands," which included a provision that stated, "A description of and an opportunity to inspect any tangible evidence that the defendant intends to introduce at trial." Defendant purportedly possessed the bat since the night of the crime, and for almost a week before the trial began his trial counsel knew that he had possession of the bat. No attempt was made to comply with MCL 767.94a or MCR 6.201(A)(6). Under these circumstances we conclude that the trial court did not abuse its discretion by precluding admission of the bat.

II. Prosecutorial Misconduct

A. Standard of Review

Defendant next argues that the prosecutor engaged in misconduct that denied him a fair trial. Because defendant failed to object to the alleged misconduct at trial, we review this issue for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *Schutte, supra* at 720. To establish plain error, a defendant must show (1) an error occurred, (2) the error was plain – i.e., "clear or obvious," and (3) the plain error affected the defendants substantial rights by prejudicing the outcome of the trial. *Carines, supra* at 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). In addition, this Court will not find error where the prejudice allegedly caused by the prosecutor's conduct could have been eliminated by a curative instruction. *People v Watson*, 245 Mich 572, 586; 629 NW2d 411 (2001), citing *Schutte, supra* at 721; see *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994).

B. Analysis

Defendant first contends that the prosecutor made "thinly veiled" references to defendant's past criminal conviction during its rebuttal argument. Defendant specifically cites the following trial excerpt:

> Now, the Defendant continues to try and push all the blame on Galbraith [sic] and say he's a felon, he's a felon, he's a felon. No question. There's no question that he's a felon. But what is the Defendant? When the Defendant participates in this kind of conduct, this kind of abusive behavior, what is the Defendant? What is he? He's a cat of the same stripe.

Viewed in context, the prosecutor's comments reference defendant's behavior during the commission of the instant offense, not his past behavior. Contrary to defendant's assertion, the prosecutor did not argue that defendant's bad character or prior bad conduct made it more likely that he committed the instant offense. Rather, the prosecutor's comment describes defendant's conduct while committing the instant offense. See *People v McElhaney*, 215 Mich App 269, 285; 545 NW2d 18 (1996). Therefore, defendant has failed to show plain error affecting his substantial rights in this regard.

Defendant also argues that the prosecutor's identification of defendant by his proper name constituted an improper attempt to inject racial or ethnic prejudice into the case. A prosecutor may not inject racial or ethnic remarks into any trial. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). However, we cannot agree that the prosecutor's use of defendant's proper name evidences an attempt "to convince the jury to convict on the basis of prejudice." *Bahoda supra* at 272. Therefore, defendant has failed to establish plain error.

Last, defendant argues that the prosecutor's statement that defendant "ha[d] a motive to lie" and that he did not inform the police of his version of the events, were improper comments related to defendant's credibility. A prosecutor may argue from the evidence that the defendant is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Given that defendant testified at trial and placed his credibility at issue, we conclude that defendant's credibility was a fair subject for argument. *People v Fields*, 450 Mich 94, 109-110; 538 NW2d 356 (1995). Therefore, defendant has failed to establish plain error in this regard.

Further, after viewing the alleged misconduct in light of the facts of the case, we find defendant was not prejudiced. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997), citing *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991); see *Carines*, *supra* at 763. Moreover, any prejudice allegedly caused by the prosecutor's conduct could have been eliminated by a curative instruction. *Watson*, *supra* at 586 citing *Schutte*, *supra* at 721. Therefore, defendant has failed to establish plain error affecting his substantial rights.

III. Ineffective Assistance of Counsel

A. Standard of Review

Defendant next argues that he was denied the effective assistance of counsel. Defendant did not preserve this issue for our review because he did not move for either a *Ginther*[1] hearing or a new trial. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1992). Accordingly, our review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law" with the courts findings of fact subject to review for clear error and the question of constitutional law subject to de novo review. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To show ineffective assistance of counsel, a defendant must show that his counsels representation "fell below an objective standard of reasonableness" and that "but for counsels unprofessional errors, the result of the proceeding would have been different." *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), quoting *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Defendant also has to show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 Mich App 294 (2001). Defendant bears the burden of overcoming the strong presumption of effective assistance of counsel. *LeBlanc*, *supra* at 578, citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2502; 80 L Ed 2d 674 (1984).

B. Analysis

First, defendant argues that his attorney's failure to disclose the baseball bat so that it could be introduced as evidence at trial rendered the defense counsel's assistance ineffective. However, defendant has failed to show how the result of the proceeding would have been different had the bat been introduced. *Toma*, *supra* at 302-303. Defendant testified that he, not Derrick Brown, an alleged perpetrator of the crime, had the bat outside the car when the other perpetrators allegedly beat the victim, Darin Kern, inside the car. This testimony contradicts the testimony of Dale Galbraith, another alleged perpetrator, and Kern that Brown had the bat outside the car. Defendant argues that his possession of the bat at the time of trial tends to support his testimony that he did not participate in the kidnapping. However, that defendant possessed the bat at the time of trial has little or no relevance in establishing who possessed the bat during the commission of the offense. Here, the witnesses who testified that Brown possessed the bat during the offense also testified that Brown participated in the kidnapping. Thus, even if Galbraith and Kern mistook defendant for Brown, they still agreed that the person in possession of the bat participated in the kidnapping. Moreover, even without the bat admitted into evidence, trial counsel was able to argue that defendant had possession of the bat and was not in the car during the kidnapping based on defendant's testimony. Therefore, defendant has failed to show that the result of the proceeding would have been different had the bat been introduced into evidence.

Second, defendant argues that his trial counsel rendered ineffective assistance by failing to call any alibi witnesses. This Court defers to trial counsel on matters of trial strategy. *Mitchell*, *supra* at 163. Here, defendant testified that he was present when Kern was taken from

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the house, and defendant fails to identify anyone who could have established an alibi. Therefore, defendant fails to overcome the presumption of effective assistance of counsel *LeBlanc*, *supra* at 578. Moreover, given the overwhelming evidence that defendant was present at the crime scene, it is unlikely that the lack of alibi witness testimony affected the outcome of the trial.

Third, defendant faults his defense counsel for failing to impeach Galbraith regarding the plea agreement he received from the prosecutor's office in exchange for his testimony against defendant. The record does not support defendant's claim. Defense counsel questioned Galbraith extensively regarding his plea agreement. Defense counsel enumerated the charges Galbraith originally faced and asked, "and in exchange for your testimony here today, all of those charges were dropped, and you were allowed to plead to attempted kidnapping, and you get a cap of one year in the county jail. Is that correct?" Later, defense counsel asked, "this plea bargain saved you from prison again, didn't it?" Further questioning in regard to this issue would not have affected the outcome of the trial. Defense counsel's cross-examination of Galbraith made clear that Galbraith received a substantially reduced sentence in exchange for his testimony.

Finally, defendant argues that defense counsel was ineffective in failing to get a certified record or LEIN printout showing Galbraith's Ohio conviction for receiving and concealing stolen property. However, Galbraith's bias and his potential lack of credibility were revealed by defense counsel's cross-examination of Galbraith. We defer to trial counsel's decision not to present further evidence of Galbraith's bias and his potential lack of credibility. *Mitchell, supra* at 163; *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Here, a certified record or LEIN printout of Galbraith's criminal history would have been cumulative to other testimony establishing his bias and his lack of credibility. Accordingly, presenting this evidence would not would not affected the outcome of trial. Therefore, defendant was not denied effective assistance of counsel.

IV. Instructional Error

We decline to consider defendant's contention that the trial court erred in recording its jury instructions and playing the tape into the record before the jury. Defendant agreed with the jury instructions and did not object to the trial court's practice of recording its instructions and then playing the tape for the jury. Moreover, defendant cannot articulate any prejudice stemming from the trial court's practice. For this reason, defendant did not brief this issue adequately, and we deem this issue abandoned. See *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001), citing *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

V. Motion for Directed Verdict

A. Standard of Review

Last, defendant argues that he was entitled to a directed verdict on the kidnapping charge because the prosecutor did not prove beyond a reasonable doubt that the Kern's movement was incidental to the kidnapping. Looking at the evidence in a light most favorable to the prosecution, we review de novo a trial court's decision on a directed verdict motion to determine

if the prosecutor presented evidence that "could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Aldrich*, *supra* at 122.

B. Analysis

In order for a defendant to be found guilty of kidnapping, the prosecution must prove that the defendant (1) forcibly confined or imprisoned another person against that persons will; (2) lacked legal authority to confine that person; (3) forcibly moved that person or caused that person to be moved for the purpose of kidnapping; (4) intended to kidnap that person; and (5) acted willfully and maliciously. CJ2d 19.1; see MCL 750.349. In order to establish the "asportation" or movement element – which is not included in the statute but which is, nonetheless, required – "there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime." *People v Green*, 228 Mich App 684, 696-697; 580 NW2d 444 (1998); *People v Jaffray*, 445 Mich 287, 298; 519 NW2d 108 (1994).

Kern and Galbraith testified that defendant and Brown moved Kern to facilitate a kidnapping. Specifically, they testified that Kern was threatened with a gun and ordered to direct the perpetrators to the location of a man who allegedly owed Galbraith $50. There was no evidence that Kern was moved so that the perpetrators could merely assault Kern, as defendant argued at trial. See *Id*. Looking at the evidence in a light most favorable to the prosecution, we conclude that a rational juror could have concluded that the prosecutor proved the asportation element beyond a reasonable doubt. *Aldrich*, *supra* at 122-123. Therefore, the trial court properly denied defendant's motion for directed verdict.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper